

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ABIONA OLASUNKAN OYEYEMI,

Defendant-Appellant.

UNPUBLISHED

June 27, 2006

No. 259861

Wayne Circuit Court

LC No. 04-008217-01

Before: Bandstra, P.J., and Saad and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of fourth-degree criminal sexual conduct, MCL 750.520e(1)(b). He was sentenced to one year of probation and counseling. We affirm.

Defendant first argues he was denied the effective assistance of counsel. We disagree. “Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. A judge must first find the facts, then must decide whether those facts establish a violation of the defendant’s constitutional right to the effective assistance of counsel.” *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). Findings of fact are reviewed for clear error, and questions of constitutional law are reviewed de novo. *Id.*, pp 484-485. Because there was no evidentiary hearing, review is limited to the facts on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

To establish a claim of ineffective assistance of counsel a defendant must show (1) counsel’s performance did not meet an objective standard of reasonableness and (2) defendant was prejudiced to the extent that there is a reasonable probability the result of the proceeding would have been different absent counsel’s errors. *Grant, supra*, pp 485-486. Effective assistance is presumed, and the defendant has a difficult burden of proving otherwise.” *People v Noble*, 238 Mich App 647, 661-662; 608 NW2d 123 (1999). The defendant must overcome a strong presumption that defense counsel’s action constituted sound trial strategy. *Grant, supra*, p 485.

During cross-examination, counsel questioned the victim regarding her relationship with defendant to establish that the sexual encounter between the victim and defendant was consensual. Specifically, counsel asked why she did not report the incident until an hour and forty-five minutes after the incident occurred and why she reported the incident at all. In

response, the victim stated she reported the incident to the authorities because she was not the first person defendant had done this to at work.

A review of the record shows that trial counsel's questioning regarding the prior incident was intended to show that the victim had discussed her relationship with defendant to someone else, even though the victim testified earlier that she had not. The defense theory of the case was that the sexual contact between defendant and the victim was consensual and that the victim alleged otherwise because she discovered, or it was rumored, that defendant was having affairs with other people at work. Decisions regarding what evidence to present are presumed to be matters of trial strategy, *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004), and we will not substitute our judgment for counsel's regarding matters of trial strategy, *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001).

Moreover, defendant has not shown that he was so prejudiced that he was denied a fair trial. *Grant, supra*, pp 485-486. The victim never explicitly stated what defendant had done to this other woman at work, and no sexually explicit details were revealed. Moreover, no evidence was presented to rebut the victim's testimony that defendant sexually assaulted her, nor was there any evidence to show that defendant and the victim had a prior consensual sexual relationship. Thus, defendant has not shown that the outcome of the case would have been different if counsel had not questioned the victim about the other woman at work. For the reasons stated, defendant has failed to prove that he was denied the effective assistance of counsel.

Defendant next argues the trial court abused its discretion when it denied the prosecutor's motion for a mistrial. We disagree. The trial court has discretion whether to grant a mistrial. *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999). Unless the defendant can demonstrate prejudice, reversal is not warranted. *Id.* Prejudice has occurred if the court's ruling was so grossly in error that either the defendant was denied a fair trial, or a miscarriage of justice resulted. *Id.*

Defendant argues that the trial court should have granted the motion for a mistrial because the victim stated during cross-examination that she "wasn't the first person [defendant] did this to at the job," and named the other person in response to continued questioning. "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Rodgers, supra*, p 714, citing *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). When a motion for a mistrial is premised on a witness' unsolicited statement, it should be granted only if the prejudicial effect of the statement cannot be cured. *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005). "[N]ot every instance of mention before a jury of some inappropriate subject matter warrants a mistrial." *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999).

Although the victim's statements that defendant may have sexually assaulted another woman at work were introduced into evidence, the statements did not deny defendant a fair trial. Relevant evidence is admissible unless "its probative value is substantially outweighed by the danger of unfair prejudice." MRE 403. After the victim testified that she never discussed defendant with anyone, counsel revisited her statement about the other individual allegedly accosted. The testimony about the other woman was elicited for impeachment purposes. Evidence inadmissible under MRE 404(b) may be admissible for another purpose. *People v*

Coleman, 210 Mich App 1, 5; 532 NW2d 885 (1995). Moreover, the evidence tended to support defendant's theory of defense – that the victim's jealousy about the other woman gave her a motive to fabricate her testimony. Evidence of bias is highly relevant to a witness' credibility. *People v Lester*, 232 Mich App 262, 272; 591 NW2d 267 (1998). Nevertheless, as already discussed, even if the statements were improper, defendant was not denied a fair trial by the admission of the statements.¹

Affirmed.

/s/ Richard A. Bandstra
/s/ Henry William Saad
/s/ Donald S. Owens

¹ Defendant also argues that the victim's statements regarding the other person were inadmissible hearsay evidence. By definition, hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); *People v McLaughlin*, 258 Mich App 635, 651; 672 NW2d 860 (2003). Because the statements regarding defendant's involvement with another woman at work were not offered for the truth of the matter asserted, but for their effect on the victim and impeachment purposes, they were not hearsay.